RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 28 2016
OFFICE OF THE CLERK

No. 16-402

IN THE

# Supreme Court of the United States

TIMOTHY IVORY CARPENTER,

*PETITIONER*,

*v.*

UNITED STATES OF AMERICA,

*RESPONDENT*.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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October 28, 2016

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## QUESTION PRESENTED

Whether the warrantless seizure and search of a cell phone user's historical records, revealing his or her location and movements over the course of 127 days, is permitted by the Fourth Amendment.

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## INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. To those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case centrally concerns Cato because it represents an opportunity to improve Fourth Amendment doctrine and maintain that provision's protections in the modern era.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Timothy Ivory Carpenter and Timothy Michael Sanders were convicted in the U.S. District Court for the Eastern District of Michigan at Detroit on charges stemming from a string of armed robberies in and around the Detroit area. They appealed on the ground that the government had acquired detailed records of their movements from their wireless carriers in violation of the Fourth Amendment. The U.S. Court of Appeals for the Sixth Circuit turned their appeal aside, finding that "[t]he government's collection of business records containing these data ... is

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[1] Rule 37 statement: All parties received timely notice of our intent to file and consented to the filing of this brief. No counsel for any party authored any of this brief and *amicus* alone funded its preparation and submission.

not a search." *United States v. Carpenter*, 819 F.3d 880, 887 (6th Cir. 2016).

In natural language and ordinary reasoning, collecting business records using legal compulsion is rather obviously "not a search." It is a seizure, which may or may not be reasonable. But under current Fourth Amendment doctrine, "not a search" stands in for one of several potential conclusions: Maybe business records are not "papers or effects." Maybe such records are not the defendants' to keep from others' view. Or maybe it was reasonable to seize them under these circumstances. We do not know because Fourth Amendment doctrine has little reference to the terms of the amendment itself.

Nearly every aspect of the appeals court's decision is shot through with doctrinal oddities that hide the rationale, oddities that would befuddle an uninitiated lawyer or an ordinary American trying to learn how the Fourth Amendment's protections work. This is not the fault of the court below, but of that doctrine, which has grown up around the Fourth Amendment since *Katz v. United States*, 389 U.S. 347 (1967).

For the sake of righting courts' application of the Fourth Amendment, this Court should accept certiorari in this case and decide it using reasoning that eschews doctrine and hews more closely to the language and meaning of the Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Absent doctrine, courts would analyze the elements of this language as follows: Was there a search? Was there a seizure? Was any such

search or seizure of "their persons, houses, papers, [or] effects"? Was any such search or seizure reasonable?

Courts use this methodology in cases involving familiar physical objects. But in harder cases, such as those dealing with communications and data, courts labor under doctrine that calls for a two-part test: First, a court will determine (or, as often, presume) that a defendant expects privacy in some item or fact. Then the court must gamely feign knowledge of whether society as a whole deems that expectation reasonable.

In corollaries to the "reasonable expectation of privacy" test, courts find government agents' *highly directed examinations aimed at finding things* "not a search" because the examination technique is directed only toward finding contraband. And in cases like this one, courts dismiss the seizure of highly revealing information as "not a search" because it passed into the possession of a third party, even when that party was required by contract and regulation to maintain the confidentiality of the information for the individual.

Consistent with deep precedent such as *Ex Parte Jackson*, 96 U.S. 727 (1878), this Court's recent cases, from *Kyllo v. United States*, 533 U.S. 27 (2001), through *United States v. Jones*, 132 S. Ct. 945, 565 U.S. ___ (2012), to *Riley v. California*, 134 S. Ct. 2473, 573 U.S. ___ (2014), provide a framework for administering the Fourth Amendment in a more reliable and juridical way. It is a framework that this Court should now articulately apply to key cases, including this one dealing with data. In doing so, this Court can give courts below, law enforcement, the

bar, and American citizens clear signals about how to apply our fundamental law, the Constitution, as a law.

As the importance of communications and data grows in society, the imperative to straightforwardly address their constitutional status rises. Without breaking past precedents, this Court can revise Fourth Amendment practice and determine when and how communications and data fit into the Fourth Amendment's categories of protected things. Doing so would permit courts below to address seizures and searches of communications and data forthrightly, confidently assessing the reasonableness of such government action. This case is an excellent opportunity to do that.

## ARGUMENT

### I. THIS COURT SHOULD APPLY THE TERMS OF THE FOURTH AMENDMENT IN ALL FOURTH AMENDMENT CASES

The first phrase of the Fourth Amendment says, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const., amend. IV. Absent doctrine, courts would analyze its elements as follows: Was there a search? Was there a seizure? Was any search or seizure of "persons, houses, papers, [or] effects"? Was any such search or seizure reasonable?

If there was a search or seizure, if it was of protected things, and if it was unreasonable, then the right has been violated. That is how to administer the Fourth Amendment.

In cases dealing with familiar objects, this Court applies the Fourth Amendment consistent with the language of the law. It looks for seizures and searches of defendants' protected items, then assesses whether or not they were reasonable. (Seizures often precede searches, so reversing the order in which the Fourth Amendment lists them is sensible.)

In *Terry v. Ohio*, 392 U.S. 1 (1968), for example, this Court applied the Fourth Amendment soundly, creating a lasting and useful precedent. The government had urged the Court to place brief "stop and frisk" incidents like a pat-down outside the scope of the law, *id.* at 16 n.12., arguing that police behavior short of a "technical arrest" or a "full blown-search" did not implicate constitutional scrutiny. *Id.* at 19. This Court rejected the idea that there should be a fuzzy line dividing "stop and frisk" from "search and seizure."

Instead, this Court wrote with granular precision about the seizure, then the search, of Terry: "[T]here can be no question ... that Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing." *Id.* One following the other, the seizure and search were reasonable and therefore constitutional.

Though Justice Douglas dissented from the ruling, he agreed that Terry was "seized" within the meaning of the Fourth Amendment. *Id.* at 35 (Douglas, J., dissenting). "I also agree," he wrote, "that frisking petitioner and his companions for guns was a 'search.'" *Id.*

*Terry* and its progeny demonstrated their value again in the recent *Riley* decision, 134 S. Ct. 2473 (2014). Note the half-dozen dogs that didn't bark—seizures and searches of familiar objects like cars and people, which are administered using direct application of the Fourth Amendment's terms rather than doctrine.

In *Riley*, Officer Charles Dunnigan pulled David Riley over, seizing him and his car consistent with the application of the Fourth Amendment to traffic stops in *Brendlin v. California*. 551 U.S. 249, 254–63 (2007).

Upon learning that Riley was driving with a suspended driver's license, Officer Dunnigan removed him from the car, continuing the original seizure of Riley with an additional legal basis for doing so: reasonable suspicion of another violation.

Officer Ruggiero prepared the car for impoundment, a further seizure, consistent with a policy that prevents suspended drivers from returning to, and continuing to operate, their vehicles. He began an "impound inventory search" of the car, as approved in *South Dakota v. Opperman*. 428 U.S. 364, 376 (1976).

That search turned up guns in the engine compartment of the car, so Officer Dunnigan placed Riley under arrest, continuing the ongoing seizure of Riley's body under new legal authority.

Officer Dunnigan then conducted a search incident to arrest—permitted to aid in the discovery of weapons or of evidence that suspects might destroy. *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

Consistent with standard practice for a "booking search," yet another legal basis for both searching

suspects and seizing their property, *see, e.g.*, *Illinois v. Lafayette*, 462 U.S. 640 (1983), Officer Dunnigan examined Riley's person and seized his possessions, including his cell phone.

All these government actions were unchallenged or fully disposed of in courts below because this Court has given law enforcement and courts the juridical tools to dispose of them: identify when seizures and searches have occurred, then determine whether or not they are reasonable.

Courts are well-equipped to make those legal and fact-specific judgments. If the constitutionality of all these investigatory steps turned on whether government agents had defeated a society-wide "reasonable expectation of privacy," this Court would have a full docket indeed.

Happily, *the Riley* opinion also assessed the search of the phone as the search that it was, without respect to privacy expectations. Having found that the phone was searched in the absence of exigency, this Court laid down the general rule of the second half of the Fourth Amendment: "get a warrant." 134 S. Ct. at 2495.

This Court does not need to retreat to doctrine when communications and data are at issue. These are items that can be seized and searched under the Fourth Amendment just like people and cars. Treating communications and data as such would focus courts on the key Fourth Amendment question: whether given seizures or searches are reasonable. Confusing doctrine stands in the way of them doing so.

## II. THIS COURT SHOULD RETURN TO APPLYING THE TERMS OF THE FOURTH AMENDMENT IN COMMUNICATIONS AND DATA CASES, ESCHEWING THE UNSOUND "REASONABLE EXPECTATION OF PRIVACY" TEST

Relying on doctrine, the Sixth Circuit's decision below begins by noting an alleged constitutional distinction between communications content and routing information. "In Fourth Amendment cases the Supreme Court has long recognized a distinction between the content of a communication and the information necessary to convey it." *United States v. Carpenter*, 819 F.3d 880, 883 (6th Cir. 2016). An uninitiated lawyer or ordinary American would have difficulty understanding what this has to do with constitutional protection for "persons, houses, papers, and effects."

The appeals court begins as it does because in recent decades this Court has often fallen back on confusing doctrine when applying the Fourth Amendment in hard cases. But this Court can apply the terms of the Fourth Amendment to communications and data cases in a granular way, as it has in the past. A line of opinions from *Ex Parte Jackson*, 96 U.S. 727 (1878), through Justice Butler's dissent in *Olmstead v. United States*, 277 U.S. 438 (1928), and the majority opinion in *Katz v. United States*, 389 U.S. 347 (1967), show how to integrate communications and data with the Fourth Amendment's textual framework. But a detour over the last fifty years into "reasonable expectations" doctrine has undercut sound administration of the Fourth Amendment.

### A. *Ex Parte Jackson* Protected Communications in Transit by Protecting Papers and Effects as Such

This Court correctly applied the Fourth Amendment to communications in *Ex Parte Jackson*, 96 U.S. 727 (1878). The opinion did not state in bullet-point order that the postal mail in question was a) searched, b) a paper or effect, and c) unreasonably searched without a warrant. But it held that "[l]etters and sealed packages . . . in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles." *Id.* at 733. Such things remain the papers and effects of their owners while in transit, and their contents are concealed, so searching them requires a warrant.

The outward form and weight of such items, not being sealed from inspection, are not constitutionally protected. This was early acknowledgement of the difference between plain view and what might be called "plain concealment." It takes no search to discover what is in plain view, so the Fourth Amendment is not implicated. *See Horton v. California*, 496 U.S. 128 (1990). It takes a search to reveal concealed matter, so the Fourth Amendment pertains. The issues are put in play by the Fourth Amendment's text and disposed of using physics and law, not privacy expectations. *See* Jim Harper, *Escaping Fourth Amendment Doctrine After* Jones*: Physics, Law, and Privacy Protection*, 2012 Cato Sup. Ct. L. Rev. 219.

In the current case, the court below, thrown off by doctrine in more recent cases, treated *Jackson* as a special rule about communications. 819 F.3d at 886.

But *Jackson* simply applied common sense: exposed facts do not require a search to be discovered, even when they are facts about papers and effects.

In the year this Court decided *Ex Parte Jackson*, both Western Union and the Bell Company began establishing voice telephone services, Gerald W. Brock, *The Second Information Revolution* 28 (2003). This Court would face that technology after the passage of some time, but perhaps before the properties of electronic communications were widely understood.

### B. *Olmstead* Involved Seizures and Searches of a Wire and Electronic Papers/Effects

Fifty years later, the ruling in *Olmstead v. United States*, 277 U.S. 438 (1928), incoherently declared wiretapping "the use of the sense of hearing, and that only." *Id.* at 464. A telephone communication, of course, renders sounds as electronic signals that travel invisibly and inaudibly along a wire, to be reformed into audible sounds at the other end. Collecting those signals and reproducing them requires attachments, equipment, and information processing well beyond simple hearing.

Justice Butler's dissent stands out because he followed the same sensible lines drawn in *Jackson*, even though the medium was now wire and electrons instead of paper. Though he left implicit the physical protections for the communications, he identified the private law protections arrayed around telephone calls and the seizure and search that disrupts those arrangements when government agents wiretap a telephone line: "The contracts between telephone companies and users contemplate the private use of the facilities employed in the service," he wrote. "The

communications belong to the parties between whom they pass. During their transmission, the exclusive use of the wire belongs to the persons served by it." *Id.* at 487 (Butler, J., dissenting).

Government agents invaded property rights in the physical wire and in the communication running over it. Specifically, the government's use of the wire and copying of the electronic effects eviscerated Olmstead's right to exclude others from his property—a small but constitutionally significant seizure. The contemporaneous rendering of the communication signal into an audible sound was a search of it. *See* Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 551 (2005) ("[A] search occurs when information from or about the data is exposed to possible human observation . . . ."). The wiretap should have required a warrant.

It would have taken prescience indeed to recognize in the 1920s that telephonic and later digital communications would be the scions of physical mail. *But see, Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting) ("Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.") Even now, the idea that papers and effects may take electronic or digital form is a bit of a challenge. But that ground is long since broken. This Court's treated a suitably shrouded oral communication as a constitutionally protected item in 1967, and that result has been widely accepted, even if clarity as to the rationale for that finding still lacks.

### C. The *Katz* Majority Inarticulately Applied the Fourth Amendment's Terms to a Shrouded Oral Communication

Regrettably when the Court reversed *Olmstead*, it avoided stating directly that the suitably concealed sound of a person's voice is a transitory "effect." (If the language of the Fourth Amendment applies, it almost certainly must be.) And even more unfortunately, the popular treatment of *Katz v. United States*, 389 U.S. 347 (1967), has been to ignore the majority's reasoning in favor of Justice Harlan's solo concurrence, which attempted to reframe the Court's Fourth Amendment jurisprudence around "reasonable expectations of privacy."

But the *Katz* majority decision was an inarticulate parallel to *Ex Parte Jackson*. The Court followed the same line as *Jackson* about disclosed matter requiring no search and concealed things requiring a seizure or search. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351 (citations omitted).

The paragraphs that followed discussed the import of Katz going into a phone booth made of glass, which concealed the sound of his voice. *Id.* at 352. Against the argument that Katz's body was in public for all to see, the Court wrote: "[W]hat he sought to exclude when he entered the booth was not the intruding eye– it was the uninvited ear." *Id.* The government's use of a secreted listening and recording device to enhance ordinary perception overcame the physical concealment Katz had given to his voice.

Gathering the sound waves seized something of Katz's.

But in his solo concurrence, which was unnecessary to the outcome of the case, Justice Harlan shared his sense of how the constitution controls government access to private communications: "My understanding," he wrote, "is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361. Justice Harlan's understanding has not aided courts' administration of cases.

### D. The Ills of the "Reasonable Expectation of Privacy" Test

Since *Katz*, courts have often followed Justice Harlan's concurrence instead of the majority's rationale, attempting to analyze whether defendants have had a "reasonable expectation of privacy" in information or things. Under Harlan's concurrence, the defeat of a "reasonable expectation of privacy" signals a constitutional search generally requiring a warrant.

Alas, courts don't often follow the full analysis Justice Harlan's formulation suggests. They rarely inquire into a defendant's "actual (subjective) expectation of privacy," for example, or how it was "exhibited." *See* Orin Kerr, Katz *Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. Chi. L. Rev. 113 (2015).

The second half of the test may flatter Justices and judges, who surely put care into their attempts to assess the entire society's emergent views on privacy, but it is a non-juridical methodology. It does not in-

volve the application of law to facts or fact-specific judgements. It requires judges to use their own views or best estimations about privacy as a proxy for objectivity.

A particularly poor example of the test in application is the opinion in *Smith v. Maryland*, 442 U.S. 735 (1979), in which Justice Blackmun walked through influences that would suppress expectations of privacy in phone-dialing information and none that would support it. *See id.* at 742–43. The court below in this case relied heavily on *Smith*, which in addition to being poorly reasoned may also be distinguished given the great quantities of data at stake in cases like this.

The slipperiness of Justice Harlan's formulation is compounded by its essential circularity. Societal expectations guide judicial rulings, which guide societal expectations, and so on. This circularity is especially problematic here at the onset of the Information Age because digital communications and data are only beginning to take their place in society. Expectations about privacy on this medium have yet to take form, and the technology continues to change, so there is simply no objectively reasonable sense of privacy for judges to discover.

### E. Corollaries of the "Reasonable Expectation of Privacy" Test are Even Worse

The "reasonable expectation of privacy" test has at least two corollaries that move doctrine even further from the Fourth Amendment's language and meaning. The first is the doctrine that treats searches tailored for illegal things as non-searches. The second is

the "third-party doctrine," which denies that shared things can be unreasonably seized or searched.

*Illinois v. Caballes*, 543 U.S. 405 (2005), is typical of "reasonable expectation" cases in that it did not examine (or even assume) whether Roy Caballes had exhibited a subjective expectation of privacy in the trunk of his car, which government agents subjected to the ministrations of a drug-sniffing dog. Thus, the Court could not take the second step, examining its objective reasonableness.

Instead, the *Caballes* Court skipped forward to a corollary of the "reasonable expectations" test that the Court had drawn in *United States v. Jacobsen*, 466 U.S. 109 (1984): "Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." *Caballes*, 543 U.S. at 408 (quoting *Jacobsen*, 466 U.S. at 123). Possession of drugs being illegal, there is no legitimate expectation of privacy in their possession. Thus, a search aimed at illegal drugs is not a search. That's confounding.

That entirely logical extension of "reasonable expectations" doctrine reveals the doctrine's role in delinking Fourth Amendment decisions from the Fourth Amendment's text. Now, instead of examining whether searches and seizures are reasonable, courts applying the *Jacobsen/Caballes* corollary can uphold any activity of government agents that appears sufficiently tailored to discovering only crime. The most *intensive government examination given to persons, houses, papers, and effects* can be "not a search," *id.*, no matter how intimate it is, no matter how often it recurs, and irrespective of any context or circumstances.

The second corollary of "reasonable expectations" doctrine, more relevant here, similarly breaks the link between the terms of the law and outcomes in cases. That is the "third party doctrine," which the court below relied on in this case.

The Bank Secrecy Act ("BSA"), Pub. L. No. 91-508, 84 Stat. 1114 (codified as amended at 12 U.S.C. §§ 1951–59. (2000)) requires banks to maintain records and file reports with the Treasury Department if they "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 12 U.S.C. § 1829b(a)(2) (2000).

In *California Bankers Association v. Shultz*, 416 U.S. 21 (1974), several parties challenged the BSA's requirements. The records-collection part of the law does not require disclosure to the government, so the Court found that it does not implicate the Fourth Amendment. *Id.* at 54. As to the reporting requirements, the Court denied standing to bank depositors who could not show that information about their financial transactions had been reported. *Id.* at 67–68.

Justice Marshall criticized how the Court avoided finding that mandated record-keeping affects a constitutional seizure just because the government would acquire the records later. "By accepting the Government's bifurcated approach to the recordkeeping requirement and the acquisition of the records, the majority engages in a hollow charade whereby Fourth Amendment claims are to be labeled premature until such time as they can be deemed too late." *Id.* at 97 (Marshall, J., dissenting).

Two years later, in *United States v. Miller*, 425 U.S. 435 (1976), the Court held that a defendant had

no Fourth Amendment interest in records maintained about him pursuant to the BSA. *Id.* at 442–43. It did not examine whether the operation of the BSA was a seizure or search, but used "reasonable expectations" doctrine to dismiss Miller's Fourth Amendment interests in documents reflecting his financial activities because they were held by a financial services provider: "we perceive no legitimate 'expectation of privacy' in their contents." *Id.* at 442.

Under these cases, the government can compel a service provider to maintain records about a customer and then collect those records without implicating his or her Fourth Amendment rights. *Cf. Los Angeles v. Patel*, 576 U.S. ___ (2015) (holding requirement that hotel operators make their guest registries available to the police on demand facially unconstitutional). The rule of *Miller* appears to be that Americans forfeit their Fourth Amendment interests in any material that comes into possession of a third party. This at least elides questions about who owns communications and data such as to enjoy a right to its protection from unreasonable seizure and search.

Based as they are in "reasonable expectations" doctrine, these holdings are hard to square with the Fourth Amendment's text. And they grow further out of synch with each step forward our society takes in modern, connected living.

Incredibly deep reservoirs of information are constantly collected by third-party service providers today. Cellular telephone networks pinpoint customers' locations throughout the day through the movement of their phones. Internet service providers maintain copies of huge swaths of the information that crosses their networks tied to customer identifiers. Search

engines maintain logs of searches that can be correlated to specific computers and the individuals that use them. Payment systems record each instance of commerce and the time and place it occurred.

The totality of these records are very, very revealing of innocent people's lives. They are a window onto each individual's spiritual nature, feelings, and intellect. They reflect each American's beliefs, thoughts, emotions, sensations, and relationships. Their security ought to be protected from unreasonable seizure, as they are the modern iteration of our papers and effects. *See United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring). These items should generally not be seized without a warrant.

Thanks to recent cases, this Court is positioned to apply traditional legal concepts such as property rights to communications and data, placing them within the framework dictated by the text of the Fourth Amendment.

## III. THIS COURT'S RECENT CASES ARE A FRAMEWORK FOR ADMINISTERING THE FOURTH AMENDMENT IN A RELIABLE AND JURIDICAL WAY

Familiar doctrine like the "reasonable expectation of privacy" test glosses over the challenges in integrating the Fourth Amendment's terms with the facts in particular cases. This Court's recent Fourth Amendment opinions, though, provide a framework for a clear return to adjudicating the Fourth Amendment as a law, even in difficult "high-tech" cases. In all cases, this Court can follow the methodology suggested by the Fourth Amendment, which is to look for searches, look for seizures, determine whether they

go to constitutionally protected items, and then determine whether they are reasonable.

This does not mean that the precise way to apply basic Fourth Amendment concepts to communications and data is already obvious. But carefully integrating long-standing legal principles with advancing technologies will facilitate the application to modern problems of Fourth Amendment concepts such as "seizure", "search", "papers", and "effects."

### A. *Jones* was a Seizure Case

Though this Court referred to the totality of the disputed government action in *United States v. Jones*, 132 S. Ct. 945 (2012), as a "search," the precipitating constitutional invasion was a seizure. That seizure occurred when government agents attached a device to a car that was not theirs, making use of the car to transport their device, without a warrant. *Id.* at 949; *see ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015) (referring to attachment of GPS device in *Jones* as "a technical trespass on the defendant's vehicle"). Though small, that seizure of Jones's car, in the form of "use," was a sufficient trigger of scrutiny for constitutional reasonableness. It facilitated a weeks-long, contemporaneous search for Jones's location. Considering the outsized effect on Jones, who was still presumed innocent, the seizure and the search were unreasonable without a warrant.

The present case is a much simpler seizure case. The government here seized data under authority given by 18 U.S.C. §2703(d). *United States v. Carpenter*, 819 F.3d 880, 884 (6th Cir. 2016). When government agents copy data or information that is otherwise unavailable to them, they have taken the rights

to use the data and to enjoy that data's benefits for the government. The owner still has possession of a copy, but the owner's right to exclude others has been eviscerated. *See* Mark Taticchi, *Note: Redefining Possessory Interests: Perfect Copies of Information as Fourth Amendment Seizures*, 78 Geo. Wash. L. Rev. 476, 491–96 (2010). Through this case, this Court should recognize data as something that can be seized.

Is it a "paper" or "effect"? Is it the defendant's paper or effect in which to assert a right? These questions come later in a methodical analysis.

### B. *Kyllo* is a Modern Search Case

Though less relevant here, this Court's opinion in *Kyllo v. United States*, 533 U.S. 27 (2001), is a wonderfully instructive modern "search" case, because it features search in the absence of seizure. That allows us to observe search in the abstract and see how concealment subjected to search produces exposure. Manufactured exposure of concealed things is a strong signal that a search has occurred.

The thermal-imaging cameras government agents used in *Kyllo* detect radiation in the infrared range of the electromagnetic spectrum (that is, with longer wavelengths than visible light). They produce images of that radiation called thermograms by representing otherwise invisible radiation in the visible spectrum. This makes imperceptible radiation perceptible to humans.

Using a thermal imager on a house was a search of it, and this Court found it so. "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that

would previously have been unknowable without physical intrusion," the Court held, "the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Kyllo*, 533 U.S. at 40. *See* Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 553 ("For the holding in *Kyllo* to make sense, it must be the transformation of the existing signal into a form that communicates information to a person that constitutes the search. What made the conduct in *Kyllo* a search was not the existence of the radiation signal in the air, but the output of the thermal image machine and what it exposed to human observation.").

### C. "Their Persons, Houses, Papers, and Effects"

This Court has been good to bestow relatively clear signals that items under consideration are within the categories listed for protection in the Fourth Amendment. In other cases, it is an essential premise of the Court's rulings. But the best practice would be to consistently and systematically recite each element of the Fourth Amendment as a model for lower courts.

The categorization of digital materials as paper, effects, or otherwise is a question that would benefit from sharpening by this Court in this case, as well as the ownership status of such items. The possessive pronoun in the Fourth Amendment circumscribes what items a defendant may assert Fourth Amendment interests in.

Pleasingly, the *Jones* Court declared the existence of a constitutionally protected item: "It is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment." 132 S. Ct. at 949. And it carefully detailed the ownership question, finding that Jones "had at least the property rights of a bailee." *Id.* at 949 n.2.

*Riley*, of course, dealt with the search of a cell phone. It is an essential premise of the ruling that phones themselves are effects. Dictum in *Riley* suggests that digital files are also effects.

The *Riley* Court declined the government's invitation to allow cell-phone searches if it is reasonable to believe that a phone contains evidence of the crime of arrest. 134 S. Ct. at 2492. Doing so, the Court said, would "in effect give police officers unbridled discretion to rummage at will among a person's private effects." *Id.* (quotation and citation omitted). This Court treated not just phones, but the digital documents and materials they hold, as effects.

The Sixth Circuit has found constitutional protection for emails, which also must rest on the premise that digital data in the form of an email file is a "paper" or "effect" for Fourth Amendment purposes. In *United States v. Warshak*, that court said: "Given the fundamental similarities between email and traditional forms of communications, it would defy common sense to afford emails lesser Fourth Amendment protection. Email is the technological scion of tangible mail." 631 F.3d 266, 285–86 (6th Cir. 2010).

The parallel between emails and tangible mail is the beginning but not the end of the relationship between digital files and the papers and effects categories. Again, the Fourth Amendment does not have special rules for communications, but covers all papers and effects equally. Email is but one of many protocols that replicate and expand on people's ability to collect, store, and transmit personal information as they did in the founding era. This court would best treat digital files as papers or effects, regardless of its determinations about the ownership status and reasonableness of seizing and searching particular files in any given case. The coverage of the Fourth Amendment must extend to these media if this Court is to succeed in "assuring preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, 533 U.S. at 34; *United States v. Jones*, 565 U.S. at 950; *id.* at 958 (Alito, J., concurring).

The final question before assessing the reasonableness of government action is whether a constitutionally protected item is the defendant's. Just as with telephones according to Justice Butler's view in *Olmstead*, people use modern communications and Internet facilities under contracts that allocate property rights. Though hardly with perfect clarity, these contracts detail how communications machinery will be used, and they divide up the ownership of information and data. *See*, Scott R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security, and Consent*, 93 Tex. L. Rev. 85, 142–45 (2014). The regulatory regime for the telecommunications sector also arguably accords property rights in communications and data to the consumer-user.

The court below, applying doctrine, back-handedly dismissed this crucial question: whether the defendants had a property right in the data about them that the government seized. *United States v. Carpenter*, 819 F.3d 880, 887 (6th Cir. 2016) ("The defendants of course lack any property interest in cell-site records..."). This Court should take up this case in order to reinforce the importance of property principles for administering the Fourth Amendment—it lists items of property, after all—and to model for lower courts how this is done with care.

## CONCLUSION

The analytical framework suggested above tees up the issue that is the central focus of the Fourth Amendment. That is the reasonableness of government agents in searching or seizing particular items.

There are very good arguments that communications, data, and data about communications are seized when government agents take them by compulsory processes. There are good arguments that these things are papers or effects for constitutional purposes. And there are arguments that the defendants, like all Americans, have property rights in such data, which is allocated to them by contract and regulation.

This Court should grant certiorari in this case to examine these arguments. The Court should sharpen its own application of the Fourth Amendment and provide a model for lower courts by eschewing "reasonable expectation of privacy" doctrine and by applying the terms of our fundamental law directly.

Respectfully submitted,

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October 28, 2016

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG 11 2017
OFFICE OF THE CLERK

No. 16-402

IN THE
# Supreme Court of the United States

TIMOTHY IVORY CARPENTER,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF OF AMICI CURIAE DATA & SOCIETY RESEARCH INSTITUTE AND FIFTEEN SCHOLARS OF TECHNOLOGY AND SOCIETY IN SUPPORT OF PETITIONER

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